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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,  Plaintiff,  vs.  JOHN PEARL SMITH, II, Defendant.	No. 3: 16-cr-00086- SLG-DMS  MOTION TO SEVER COUNT 17 PURSUANT TO FED. R. CRIM. P. 14(A)
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**I. MOTION**

Comes now the defendant John Pearl Smith, II and moves to sever Count 17 from the First Superseding Indictment. This motion is based upon Fed. R. Crim. P. 14 (a).

**II. FACTS RELATED TO THE MOTION**

On March 22, 2017, the Government filed the first Superseding Indictment. Dkt 102. In that indictment Smith is charged with Count 1: interference with commerce by robbery, alleged to have occurred on June 5, 2016; Count 2: attempted possession with the intent to distribute contraband, alleged to have occurred on June 5, 2016; Counts 3-8: various 924 (c) murder allegations, all alleged to have occurred on June 5, 2016; Counts 9-

MOTION TO SEVER COUNT 17 - 1

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1 11: allegations relating to a May 11, 2016 robbery; Counts 13-16: allegations relating to a  
2 September 2015 robbery.

3 Count 17 is a felon in possession of a firearms charge. It alleges that on June 22,  
4 2016 -- the date of Smith's arrest and related searches -- Smith was in possession of four  
5 weapons and it sets forth Smith's five prior felony connections to support that allegation.

### 6 III. ARGUMENT

7  
8 Fed. R. Crim. P. 14(a) states: "If the joinder of offenses ....in an indictment, an  
9 information, or a consolidation for trial appears to prejudice a defendant or the  
10 government, the court may order separate trials of counts, sever the defendants' trials, or  
11 provide any other relief that justice requires."

12 As the Ninth Circuit has recognized, there is a significant risk of prejudice to a  
13 criminal defendant when a felon-in-possession charge is tried together with another felony  
14 charge. *United States v. Nguyen*, 88 F.3d 812, 815-16 (9th Cir. 1996). This prejudice arises  
15 from the jury being told that the defendant is both someone who possesses guns separately  
16 from the commission of the alleged robbery, and that he has previously been convicted of a  
17 felony. *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir.), *amended on denial of reh'g*,  
18 798 F.2d 1250 (9th Cir. 1986). "When trying an ex-felon count together with other counts,  
19 the trial judge must 'proceed with caution to avoid undue prejudice.'" *United States v.*  
20 *Dockery*, 955 F.2d 50, 53 (D.C. Cir. 1992).

21 While it is true that the indictment charges the use of a firearm in the commission  
22 of the murders and robberies, the felon in possession count should still be severed. In  
23 Count 17, the Government is alleging that Smith possessed four weapons - none of which  
24 are the alleged murder weapons. Moreover, one of the weapons is a semi-automatic rifle --  
25 which by itself is particularly prejudicial. And that Count sets forth four prior felony

MOTION TO SEVER COUNT 17 - 2

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1 convictions which would not all be admissible in the Government's case-in-chief, and  
2 which would be far more prejudicial than probative on the issues to be decided.

3 **IV. CONCLUSION**

4 Based upon the above, the defendant respectfully requests that this Court grant  
5 Smith's motion and sever Count 17.  
6

7 DATED this 16<sup>th</sup> day of January, 2019.

8 /s/Suzanne Lee Elliott

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16 /s/Steven Wells

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24 **CERTIFICATE OF SERVICE**

25 I, SUZANNE LEE ELLIOTT, certify that on January 16, 2019, I filed foregoing  
document with the United States District Court's Electronic Case Filing (CM/ECF)

MOTION TO SEVER COUNT 17 - 3

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1 system, which will serve one copy by email on Assistant United States Attorneys FRANK  
2 V. RUSSO, WILLIAM A. TAYLOR, JAMES NELSON AND KAREN VANDERGAW.

3 /s/ Suzanne Lee Elliott

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25 MOTION TO SEVER COUNT 17 - 4

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